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IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

No. 701

CURTIS REID, Superintendent of the District of Columbia Jail, *Appellant*,

v.

CLARICE B. COVERT

On Appeal from the United States District Court for the District of Columbia

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No. 713

NINA KINSELLA, Warden of the Federal Reformatory for Women, Alderson, West Virginia, *Petitioner*,

v.

WALTER KRUEGER

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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PETITION FOR REHEARING

Now come CLARICE B. COVERT, Appellee in No. 701, and WALTER KRUEGER, Respondent in No. 713, and respectfully pray the Court to grant rehearings in these causes.

Mrs. Covert and Mrs. Smith, the two civilian women whose fate is here in issue, were tried by *court-martial*, pursuant to Article 2(11) of the Uniform Code of *Military* Justice, and had their convictions successively reviewed by Boards of Review in the Offices of the *Judge Advocate General of the Air Force* and *of the Army*, respectively, and then by the Court of *Military* Appeals. The latter tribunal held, while the present cases were under advisement here, that "Article 2(11) of the Code is a valid exercise of Congressional power granted by the Constitution 'to make Rules for the Government and Regulation of the land and naval Forces.'" *United States* v. *St. Clair*, 7 USCMA 82, 83, 21 CMR 208, 209, decided May 25, 1956. But this Court declares (slip opinion, No. 713, pp. 6-7) that there is no need to examine the power of Congress under that clause of the Constitution.

The concept of presenting Hamlet without the Prince of Denmark doubtless has fascination. But just as the Melancholy Dane cannot, despite heroic efforts, be completely exorcised from the play, just as he constantly flits back and forth into the action regardless of nomenclature, so in these cases, where the results were reached after ostensible rejection of whatever powers the Constitution has conferred upon Congress to govern the armed forces, a reading of the Court's opinions makes obvious that military considerations were necessarily relied upon to uphold the court-martial proceedings here under review.

A. Thus it is said (slip opinion, No. 713, pp. 7-8) that the United States must maintain American forces in many foreign countries; that "the lives of military

and civilian personnel alike are geared to the local military organization"; and that by enacting Article 2(11) "Congress has provided that all shall be subject to the same system of justice and that *the military commander who bears full responsibility for the care and safety of those civilians attached to his command shall also have authority to regulate their conduct.*" [Italics added.] These, without question, are purely military considerations relevant to—and relevant only to—the power "To make Rules for the Government and Regulation of the land and naval Forces."

B. It is said (slip opinion, No. 713, pp. 10-11) that "this case presents no problem of * * * the power of Congress to provide for trial of Americans sojourning, touring, or temporarily residing abroad." But *In re Ross*, 140 U.S. 453, on which the jurisdiction in the present cases is rested, involved the trial by an American consular court of a British subject who was temporarily in Japan only while the American ship in whose crew he served was lying at anchor in Yokohama harbor. See 140 U.S. at 456-457, 470-475. The difference between Ross's situation and that of the two women involved here is that they were abroad for a far less temporary stay, the exact length of which was dependent on their respective husbands' tours of military duty, and that their American links were far less tenuous than those of Ross. Again, the governing consideration is their relationship to the American armed force of which their husbands were members.

C. In No. 701, the Court's opinion (pp. 4-5) speaks of "military jurisdiction", of "military prisoners", and cites decisions of "military courts" in considering whether Mrs. Covert may be retried by a court-martial within the District of Columbia.

Thus, the Court sustains, in these two cases, an obvious exercise of the power "To make Rules for the Government and Regulation of the land and naval Forces" while disclaiming all inquiry into the extent of that power. And for the first time in the Court's history, it approves the trial of civilian women by court-martial in time of peace.

II

The Court says (slip opinion, No. 713, p. 8) that "The choice among different types of legislative tribunals is peculiarly within the power of Congress," citing *Ex parte Bakelite Corp.*, 279 U.S. 438, 451. But to deal with these cases in terms of legislative choice is to rest on a demonstrable fiction, for it is the incontrovertible fact that Congress never considered that it was being faced with any "choice among different types of legislative tribunals."

The legislative materials reflect no awareness whatever of any constitutional problem. They show without question that, in 1916 when it first extended court-martial jurisdiction over civilians accompanying the armies in time of peace in AW 2(d), in 1920 when it reenacted that provision, in 1948 when it permitted AW 2(d) to survive the amendments to the other Articles of War passed in that year, and again in 1949-1950, when it extended the same provision to all of the armed forces as Article 2(11), UCMJ, Congress never considered the constitutionality of that jurisdiction under any clause of the Constitution,[1] much

[1] "The Code is a uniform system of legal procedure, applicable beyond any constitutional question to all servicemen stationed abroad. It was adopted by Congress only after an exhaustive study of several years duration and the consultation of acknowledged

less that it made a deliberate selection among classes of available tribunals. The same legislative materials also show that, in 1916, in 1920, in 1948, and again in 1949 and 1950, there was simply no mention of courts other than courts-martial for the trial of accompanying civilians; that at no time in the hearings or on the floor of either house was there even a whisper about consular courts; and that *In re Ross*, 140 U.S. 453, was not cited by anyone, anywhere, at any time. These omissions, it is proper to add, should hardly occasion surprise, inasmuch as the traditional view regarded a court-martial not as a species of legislative court, but as "a purely executive agency designed for military uses." Winthrop, *Military Law and Precedents* (2d ed. 1896) *54 [1920 reprint, p. 49].

The Court's reference to Congressional choice in connection with Article 2(11) is the more unreal when it is borne in mind that the Uniform Code of Military Justice in the House was under the unchallenged control of that body's Committee on Armed Services; that extensive hearings were had thereon by the Senate Committee on Armed Services; that a proposal thereafter to take the Code from the calendar for reference to the Senate Committee on the Judiciary was opposed by the Chairman of the Armed Forces Committee on the ground that the Code was essentially a reincorporation of existing law and that it was "an extremely important step toward unification [of the armed services] and provides for reforms in the court-martial

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authorities in the fields of constitutional and military law." Slip opinion, No. 713, pp. 8-9, citing the 1949 Hearings before a Subcommittee of the House Committee on Armed Services.

No reference to any specific discussion of the constitutionality of Article 2(11) is made in the Court's opinion—and none; it is submitted, can be made: There was no such discussion.

system which should be enacted as soon as possible" (96 Cong. Rec. 1366-1368); and that the motion for change of reference was defeated (96 Cong. Rec. 1412-1417).

To the extent, therefore, that there was any expression of preference, the choice was to consider the Code under the aegis of the Committee most conversant with military problems, which dealt with the matter on the footing of continuing a military policy already on the statute book, and which in consequence would hardly be expected to weigh competing considerations.

In short, insofar as one can properly attribute to Congress any intent with respect to a problem of which it was not really aware, that intent was to proceed under its power to govern the armed forces and not under such powers as it may have had to create a particular type of legislative court from among those available. The latter choice it did not choose to make.

III

Nowhere in the Court's opinions is there any mention of the specific source of constitutional power on which the present extraordinary court-martial jurisdiction over civilians is rested.

Inquiry into the scope of the power to govern and regulate the armed forces is expressly avoided (slip opinion, No. 713, pp. 6-7). The war power—Article I, Section 8, Clause 11—is not mentioned. The now exploded notion that the "cases arising in the land or naval forces" clause of the Fifth Amendment is in itself a source of military jurisdiction (*Toth* v. *Quarles*, 350 U.S. 11, 14) is not sought to be revived. The treaty power is not relied on; the Court says

(*id.*, p. 11) that "No question of the legal relation between treaties and the Constitution is presented." And while there is a reference (*id.*, p. 5) to legislative courts and the line of cases beginning with *American Ins. Co.* v. *Canter*, 1 Pet. 511, the power considered in those cases was that granted by Article IV, Section 3, to "make all needful Rules and Regulations respecting the Territory * * * belonging to the United States," a power that is obviously irrelevant when the United States is on foreign soil with the consent of the foreign sovereign—the situation in both cases here.

The Court does not point to any clause or phrase of the Constitution that confers on the Congress power to withdraw from American citizens seeking protection against the acts of American officials not only the guarantee of trial by jury (Article III, Section 2; Sixth Amendment) and of indictment by grand jury (Fifth Amendment), but also the Sixth Amendment's guarantee of confrontation (*United States* v. *Sutton*, 3 USCMA 220, 11 CMR 220) and the Eighth Amendment's guarantee of the right to bail (Dig. Op. JAG, 1912, p. 481, ¶IC)—and this under a system of procedure formulated by the President pursuant to authority delegated to him in his capacity as Commander-in-Chief. Article 36, UCMJ (50 U.S.C. §611); *Manual for Courts-Martial, US, 1951* (Ex. Order 10214, 16 Fed. Reg. 1303). It is one matter to draw on the President's inherent power as Commander-in-Chief to discipline the armed forces (*Swaim* v. *United States*, 165 U.S. 553, 555-558); it is quite another to rest on that source when dealing with the rights of American civilians. Yet it is the *Manual* prescribed by the President by which the criminal liability of both women has been or will be determined, as the military opinions in their

cases clearly show (No. 701, R. 12-121; No. 713, R. 23-94). Otherwise stated, the test of whether their respective mental states negatived legal responsibility—the sole contested issue before the military authorities in both cases—has been laid down by the President—and only by the President.

What is there in the Constitution that endows the Chief Executive with such untrammelled power over the liberty of two civilians?

To say that the Court's opinions raise more constitutional questions than they resolve is therefore not in any sense hyperbole.

IV

In No. 713, the Court could say (slip opinion, p. 10), "We note that this case presents no problem of the jurisdiction of a military court-martial sitting within the territorial limits of the United States * * *". But that precise problem is squarely presented in No. 701, the case of Mrs. Covert, who was being held for retrial by a general court-martial of the Air Force at Bolling Air Force Base within the District of Columbia.

In her case, the Court holds that a jurisdiction carefully circumscribed to persons accompanying the armed forces "without the continental limits of the United States" (Art. 2(11), UCMJ) is nonetheless applicable to Mrs. Covert within those limits, because (slip opinion, No. 701, p. 5) "military jurisdiction, once validly attached, continues until final disposition of the case." Mrs. Covert has never questioned, at any stage of the present case, the proposition that a rehearing is a continuation of the original proceeding.

But the quoted holding makes the Court more militarist than the military, without a single military precedent to support its conclusion; for the military rulings, from the Civil War down through the Korean conflict, are uniformly to the effect that any separation of the individual from military status by affirmative act of Government, at any stage of the proceedings, terminates military jurisdiction over him.[2] Since discharge, muster out, or release to inactive duty has that effect on a soldier, because it changes him from soldier back to civilian, then surely the Government's act of removing a serviceman's dependent wife from without back to within the continental limits of the United States should similarly terminate an amenability to trial by court-martial that is geographically restricted by the Code to civilians overseas.

Mrs. Covert's military status under the Code was dependent on her accompanying the armed forces overseas. When the Government brought her back to the United States, it terminated that military status. And certainly her trial by court-martial within the United States is not even sought to be constitutionally justified by any of the considerations set forth in the Court's opinion in No. 713. Nowhere there is it suggested that Ross could have been tried in this country by the consul before whom he was haled in Japan.

If, however, the Court's ruling on this point stands, then some time this fall or winter—because the Air Force is determined to retry Mrs. Covert, almost as

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[2] Dig. Op. JAG, 1912, p. 514, ¶ VIII 4 1 (rulings from 1862 on); *United States* v. *Sippel*, 4 USCMA 50, 53, 15 CMR 50, 53 (1954); and see the rulings collected and discussed in appellee's brief at pp. 23-27.

though its military honor were somehow involved[3]—there will be presented the spectacle, frightening in its forebodings for the future, of a civilian woman on trial before a military tribunal in the District of Columbia. This will be the first such trial since that of Mrs. Surratt—which is hardly a pretty precedent, or one of which any American can be proud. See, e.g., Moore, *The Case of Mrs. Surratt* (1954).

V

But there is an issue now presented by these cases that far transcends the future of the two women immediately involved, and which is infinitely more disturbing in its implications than any of the serious constitutional questions already canvassed.

That issue concerns the Court's adjudicatory procedures in these cases.

Both cases were placed on the summary calendar (J. Sup. Ct., Oct. T. 1955, p. 173), and, as the references in the margin show, both were prepared for argument on an accelerated schedule that cut nearly in half the time for briefs allowed under the new Rules.[4]

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[3] The Solicitor General opposed her motion to stay the mandate pending the Court's disposition of the present Petition for Rehearing unless she would consent to subject herself to further psychiatric probing at St. Elizabeth's during the summer. Otherwise stated, the Government offered her a choice between confinement in jail and confinement in an asylum. On June 18, 1956, however, Mr. Justice Clark granted her motion and stayed the mandate.

[4] There was no printed record below in either case. The Clerk's files show that he transmitted the printed records to counsel for the parties on March 21 and 22. Under Rules 41(1), 41(2), and 43(1), argument should therefore normally have been held some 75 days later. In fact, it took place on May 3, an interval of only 42 days.

The argument itself came late in the Term. Indeed, not only was that argument the last on the calendar, on May 3 (J. Sup. Ct., Oct. T. 1955, pp. 230-231)—but it took place very late on that day, concluding long after the usual adjournment hour.[5] The question whether military jurisdiction over Mrs. Covert continued so as to subject her to retrial by court-martial in the United States was not discussed orally by either side, and on the basic issue that is considered by the Court in Mrs. Smith's case, losing counsel was asked only three questions, one of which inquired as to the location of a treaty provision that had been mentioned orally.[6] To the extent, therefore, that there is "a tradition of the Supreme Court as a tribunal not designed as a dozing audience for the reading of soliloquies, but as a questioning body, utilizing oral arguments as a means for exposing the difficulties of a case with a view to meeting them", the lateness of the hour perceptibly impaired the probing process.

Most serious of all, however, is the circumstance that the Court's opinions were announced before the three dissenting Justices had had time to formulate their views, and before another Justice had even been able to reach a decision. It cannot be said that a further period of waiting would have been without effect. Only recently, a Justice whose experience spanned twelve full Terms declared, in his posthumous declaration of constitutional faith, that "not infrequently the detailed study required to write an opinion, or the persuasiveness of an opinion or dissent, will lead to a

[5] The argument ended at 5:40 P.M. (Ward & Paul Transcript, p. 64), whereas the traditional time for adjournment, now codified in Rule 4(1), is of course 4:30 P.M.

[6] Ward & Paul Transcript, pp. 52, 54.

change of a vote or even to a change of result." Jackson, *The Supreme Court in the American System of Government*, p. 15.

These petitioners for rehearing, therefore, may justly complain that their contentions did not receive as full consideration as if their causes had been argued a few months earlier. And they cannot forbear to remark that there appears to be no compelling reason of judicial administration why all of the Term's cases must be disposed of within the Term, or why the Court cannot return to its former practice of holding argued cases over the summer for disposition at the following Term.[7] Otherwise there is added to the inherent hazards of litigation the further danger of an inequality of treatment as among litigants that rests only on the happenstance of the position of the case on the calendar for the particular Term.

But, if the present practice is to be continued, then, assuredly, reargument is called for in these cases. True, "Rehearings are not a healthy step in the judicial process; surely they ought not to be deemed normal procedure." *Western Pacific Railroad Case*, 345 U.S. 247, 270. But certainly the issues that are involved in the present causes would seem to have far more public importance than those that were under consideration in the last two instances wherein this

[7] As late as the 1929 Term, the Court decided eight cases that had been argued during the 1928 Term. *Gonzales* v. *Roman Catholic Archbishop*, 280 U.S. 1; *FTC* v. *Klesner*, 280 U.S. 19; *Sanitary Refrig. Co.* v. *Winters*, 280 U.S. 30; *Williams* v. *Riley*, 280 U.S. 78; *Bekins Van Lines* v. *Riley*, 280 U.S. 80; *Grant* v. *Leach & Co.*, 280 U.S. 351; *Surplus Trading Co.* v. *Cook*, 281 U.S. 647; *Wheeler Lumber Co.* v. *United States*, 281 U.S. 572 (argued April 25, 1929; certificate dismissed May 27, 1929; restored to docket for reconsideration June 3, 1929; decided May 26, 1930).

Court granted a rehearing after opinions had already been published. *Elgin, J. & E. R. Co. v. Burley*, 325 U.S. 711, rehearing granted, 326 U.S. 801, second opinions, 327 U.S. 661; *Graver Mfg. Co. v. Linde Co.*, 336 U.S. 271, rehearing granted, 337 U.S. 910, second opinions, 339 U.S. 605.

Least of all in the present cases, which will have such far-reaching consequences for so many individuals, and which plainly concern grave national policies as well, can the Court afford to substitute for the patient maturing of the judicial process a method of disposing of causes that all too obviously involves decision by deadline.

VI

This Petition for Rehearing should be granted, and both cases should be set down for reargument on the regular calendar.

Respectfully submitted.

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CERTIFICATE OF COUNSEL

I certify that this petition is presented in good faith and not for delay.

FREDERICK BERNAYS WIENER

JULY 1956.